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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a ALLEN MERRITT) and ANGIE BOND, ET AL.,

Petitioners,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled matter on the 3rd day of October, 1966.

Citations to Opinions Below

The relevant opinions below are (i) *Carroll* v. *Associated Musicians,* 206 F. Supp. 462, affirmed 316 F. 2d 574 (2 Cir. 1963); (ii) certain mesne proceedings, *Carroll* v. *Associated Musicians,* 284 F. 2d 91 (2 Cir. 1960) and *Carroll* v. *American Federation of Musicians,* 295 F. 2d 484 (2 Cir. 1961); (iii) *Cutler* v. *Federation,* 231 F. Supp. 845, affirmed 316 F. 2d 546 (2 Cir. 1963); certiorari denied, 375 U. S. 941 (1963). (The foregoing citations constituted the

foundation for plaintiffs' application for counsel fees which was denied in) (iv) *Cutler* v. *Federation,* 231 F. Supp. 845, afirmed without opinion by the Court of Appeals, 2 Cir., in F. 2d .

Jurisdiction

The judgment of the Circuit Court of Appeals, 2d Circuit was entered on the 3rd day of October, 1966. The rehearing was denied on the 25th day of November, 1966.

The jurisdiction of this Court is invoked under 28 USC § 1254.

Questions Presented

1. Is it consonant with the declared public policy to permit a labor union to evade payment of counsel fees for a successful action which eliminated admittedly unjust and unlawful fiscal exactions and enjoined adoption of a policy which distributed the tax burden equitably among union's members?

2. Was *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939), which declared the power of the Chancellor to award counsel fees in the so-called fund cases, intended to apply to the so-called union class actions, and to enlarge the substantive requirement for allowance in the union class actions to include a showing of a "dominating interest of justice" beyond that of the benefit resulting from the action as a ground for a counsel fee allowance?

3. Are the strictures which govern allowance of counsel fees as part of adversary party costs applicable to allowance of counsel fees in union class actions?

4. Is it not a deprivation of plaintiffs' constitutional rights to consider, as prejudically affecting their right to

a counsel fee allowance, plaintiffs' other and unrelated good-faith recourse to courts and governmental agencies?

5. Is it a ground for disallowance of a counsel fee award that plaintiffs may personally benefit as a result of their successful action?

6. Is it a ground for disallowance of a counsel fee award that the majority of defendants' members are *personally* financially disadvantaged by a fiscal reform which corrects unlawful, admittedly unjust and disproportionate fiscal exactions and substitutes therefor a system which distributes the tax burden equitably among all members?

7. Is it consonant with this Court's declared policy of insuring access in the courts to punish good-faith, lawful recourse to the courts as obtained here?

8. Is it not a deprivation of plaintiffs' constitutional rights to deprive them of a counsel fee award for reasons deriving from issues not properly tendered nor considered and on which plaintiffs never had an opportunity to defend?

9. Is it consistent with the declared policy of encouraging the bringing of labor union regulatory actions to hold, as the court below has held, that the benefit resulting from plaintiffs' action is not, of itself, a sufficient showing of a "dominating interest of justice" for a counsel fee allowance?

10. Was a counsel fee allowance properly denied in the light of the facts and circumstances of this case?

Statement

Plaintiff Cutler was successful in this action, decided November 12, 1962, affirmed 316 F. 2d 546 (2d Cir.), certiorari denied, 375 U. S. 941 (1963). As a result, defend-

ants effected significant changes in their long standing fiscal policy.

Plaintiffs applied for allowance of costs and disbursements and the reasonable value of the legal services rendered in this action and in 60 Civil 1169 and 60 Civil 4025 (hereinafter *Carroll* actions). The district court entered an order on July 10, 1964 denying the said application. *Cutler* v. *Federation,* 231 F. Supp. 845.

History of the Litigation

The *Cutler* action plaintiffs, members of defendant unions, are orchestra leaders, who lead orchestras which perform at weddings, dances, sports and other events.

Defendant American Federation of Musicians of the United States and Canada (hereinafter "Federation") is an international union with over 280,000 members; defendant Associated Musicians of Greater New York Local 802 (hereinafter "Local") is one of Federation's locals, with about 30,000 members.

The *Carroll* actions were previously brought by orchestra leaders situated similarly to the *Cutler* plaintiffs *inter alia* for adjudication that a Local Tax of 1½ percent and a surcharge of 10% imposed by defendants were illegal under Section 302 of the Labor Management Relations Act, as amended, 29 U.S.C § 186, and for an injunction to restrain their collection.

Defendant Local had imposed a Local Tax of 1½ percent of the Local's unilaterally imposed wage scale. The union's by-laws required the leader to transmit to the local the "Taxes" which he was to deduct from his own share and from the wages of the other orchestra members, known as "sidemen." The 1½ percent tax was not collected if the orchestra performed outside of the jurisdiction of Local. In such case, the leader was obligated, under rules

of Federation to pay to Federation an amount equal to 10 percent of the contract price set by the local in the area in which the performance was rendered. The 10 percent was charged to the purchaser of the musical performance, and was never deducted from the sidemen's wages. It was an exaction from the leader's share.[1] The leader was required to pay these exactions on a basis entirely different from that of other union members. Four-tenths of the ten percent went to the local in whose jurisdiction the engagement was played; four-tenths was retained by Federation; two-tenths was *theoretically* but not in fact paid to sidemen through the leader. Defendants kept no record of the names of the sidemen to whom the leader was, under union rules, supposed to pay the said two-tenths.

After mesne proceedings which twice[2] brought the *Carroll* actions to the Second Circuit, by stipulation of the parties a consolidated trial was held before District Judge Levet. Upholding the *Carroll* plaintiffs' contention that the challenged exactions were unlawful in the single engagement field, he dismissed the complaint[3] on the ground that Carroll and Peterson, as non-members[4] of the defendant unions, were not obligated to comply with their bylaws.

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[1] The tax contributions derived from this source amounted to approximately 63 percent of all revenues collected by Unions, although the earnings subject to this tax comprised only 12 percent of all musicians' earnings (p. 106a, Appendix to Plaintiffs-Appellants' Brief).

[2] *Carroll* v. *Associated Musicians*, 284 F. 2d 91 (2d Cir.) and *Carroll* v. *American Federation of Musicians*, 295 F. 2d 484 (2d Cir.).

[3] *Carroll* v. *American Fed. of Musicians*, 206 F. Supp. 462 (S. D. N. Y. 1962), aff'd 316 F. 2d 574 (2d Cir. 1963).

[4] It appears that three weeks after the Carroll trial was closed, defendants raised, for the first time, the contention that Carroll and Peterson had no standing to sue by reason of their having been expelled from membership in defendant unions after they had commenced their action. The Carroll plaintiffs' application to the trial court to reopen the trial to adduce testimony as to the cause of such dismissal was denied.

The *Cutler* action was thereupon brought July 20, 1962, to restrain collection of the wage tax and the 10 percent surcharge. By agreement of the parties, the district court used the record and affidavits in the *Carroll* actions, wherein Cutler was a witness, as the sources of the facts in this case and issued a preliminary injunction. Following further stipulation as to use of those sources, the district court made permanent the injunction previously granted.

An appeal by the *Carroll* plaintiffs had, in the meantime, come on to be heard before the Second Circuit. It appearing that the district court was about to decide the companion *Cutler* case, the parties agreed to defer argument until *Cutler* was decided, when both cases could be argued together. *Carroll* was reargued with *Cutler* on March 19, 1963. Dismissal in *Carroll* was affirmed[5] on the ground that Carrol and Peterson had no standing to challenge the union exactions because they are no longer members of the union. The Second Circuit also affirmed *Cutler*. In so doing, it struck down the district court's findings[6] and defendants' contentions (i) that the traveling surcharges were imposed on the sidemen's earnings; (ii) that the amounts were in fact deducted from the sideman's wages; and (iii) that the leader was collecting and paying over his and the sideman's union obligations; this court holding that "the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share"; "that the [traveling surcharge] is never deducted from the sideman's wages"; and that "the leader is here required to pay further exactions on a basis entirely different from that of other union members."

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[5] 316 F. 2d 574 (2 Cir. 1963).

[6] The district court's enigmatic and self-contradictory finding: "Federation members who perform a 'miscellaneous, out-of-town engagement' *are paid, but do not actually receive, in addition to their wages,* an amount equal to 10% of the minimum wage established by the local" (§ 17, emphasis added) was the source of the delineated findings.

Defendants' dissatisfaction with the findings of this court just quoted was made the fulcrum of their applications to the Second Circuit for reargument, and to this Court, for certiorari,[7] both of which were denied.

The complaints.

The complaints in the *Carroll* (128a-136a[8]) and *Cutler* (145a-155a) cases were essentially the same. Each complaint contains a single cause of action and seeks: (i) declaratory judgment condemning, as violations of Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186), the so-called "local tax" and "traveling surcharge" imposed by defendants upon orchestra leaders who are employers; and (ii) temporary and permanent injunctions forbidding such violations.

The answers.

Defendants' amended answer (137a-144a) in *Carroll,* in addition to denials, asserts many separate defenses: that the challenged exactions had been accepted by plaintiffs for more than fifteen years, hence they were barred from any equitable relief (142a); that the pattern under which defendants operate has been set for so many years that an injunction would cause defendants more harm than it would occasion benefit to plaintiffs (143a); and that defendants' By-Laws provide plaintiffs ample and complete remedies and they are therefore not entitled to any relief from the court (144a); *etc.*

The answer in *Cutler* (156a-161a) contains, in addition to denials, several defenses: that the exactions had been in force for approximately twenty and thirty years; that plaintiffs had, for more than thirteen years, accepted and

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[7] 375 U. S. 941 (1963).

[8] The numbers in parentheses followed by the letter "a" refer to the pages of the Appendix to Plaintiffs' Brief.

made the exactions now challenged, by reason of which they were guilty of laches and debarred from relief (160a); that an injunction would disrupt the pattern under which defendants operate and cause defendants harm disproportionate to any benefit to plaintiffs.

Disposition of the litigation.

The District Court held that "The local tax and the traveling surcharge are illegal as applied to the plaintiff in the single engagement field."

An injunction was granted to *Cutler* accordingly.

The other plaintiffs and plaintiffs-intervenors were granted preliminary injunctions.

The Beneficial Consequences to Defendants of Plaintiffs' Judgment

During all of the time the *Carroll* and *Cutler* actions were pending defendants were sounding warnings of the dire consequences to defendants which would follow invalidation of their long-entrenched unlawful fiscal exactions. Defendants' principal officers were publicly informing their membership: that they would effect a change in their fiscal policy in compliance with the *Cutler* judgment only in the event of and after affirmance by the United States Supreme Court (108a); that the challenged surcharge is the union's basic source of revenue[9] (98a), and represents 63 percent of all its revenues, although the traveling musicians represent only 12 percent of total

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[9] Defendants' Treasurer's Report for 1962-1963 gives the following breakdown of Federation's income (122a):

		Percent
Travelling Orchestra Surcharge....	$1,428,538	63.88
Per Capita Tax	379,473	16.97
Federation Initiation Fee	319,179	14.27
All Others	109,251	4.88

music earnings (103a, 106a); that "[t]hese traveling musicians—our friends, dedicated and faithful members of the Federation, and good trade unionists—have been saying for many years that they should not be called upon to bear such a disproportionate weight of the Federation's financial needs. They have talked to you and to me[10] and we have recognized the inherent justice in their complaint" (107a); that this inequity could not be indefinitely ignored (107a); that "[w]e[11] can't sustain this tax because no one is going to continue to pay it"; that [defendants'] convention delegates must either put the Federation on a sound financial basis or dissolve it (104a).

The warning given by Local President Manuti was echoed by Federation President Kenin who exhorted the members "to grant a change to a responsible per capita dues basis that will insure a continuation of the international union" (115a); otherwise, he warned, the musician critics of the old surcharge methods may break away and form a rival union (115a).

A new fiscal policy was accordingly enacted in substitution for the one declared illegal. Thereby the general policy of the law which requires all to bear in just proportion the burdens of government was given effect and impending threats of criminal prosecution (108a) and of Federation's destruction (104a) were averted.

Causal Relation Between the Cutler Judgment and Defendants' Fiscal Reform

The district court had found that the *Cutler* decision was a "significant, if not the determinative, factor in the Federation's decision to revise its fiscal policies" (18a). This conclusion finds support in defendants' official utterances (108a) and the official account of their proceedings

[10] Federation's President Kenin.

[11] Alfred J. Manuti, president of Local.

(121a, 125a, 126a) and, contrary to what defendants' affidavits *seem* to say, in the assertions[12] of defendants' counsel on the application now under review.

Fee and Expenses Application

On January 30, 1964, plaintiffs applied to the district court for allowance of counsel fees and expenses in *Carroll* and *Cutler*. Plaintiffs' attorney's work in these actions constituted an uninterrupted and unified series of efforts contributing to the successful result (29a) and to elimination of defendants' inequitable and unlawful fiscal policy.

Plaintiffs' counsel's involvement with these actions began in 1959; during four years, plaintiffs' attorney devoted almost 6,000 hours of his time and at least 3,500 hours of the time of his associates and estimates the value of his legal services at $410,000. The estimate that defendants have paid to their attorneys approximately $300,000 in legal fees (34a) to January 1964, the date of plaintiffs' application is nowhere denied or commented upon.[13]

The independent grounds on which plaintiffs sought a fee allowance, are:

1. Plaintiffs have, by their actions benefited defendants, Federation's locals and all their members, as well as all orchestra-leader employers [Benefit theory].

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[12] In their joint Memorandum In Opposition To Plaintiffs' Motion For Counsel Fees, submitted below, defendants' counsel stated (page 25):

> "It would indeed be shocking if, considering the bitterness of the instant litigation, plaintiffs could be awarded counsel fees because they have conferred on defendants an informational 'benefit' [i.e. of the illegality of the exactions] upsetting their entire financial policies—policies which had gone unchallenged by anyone for decades. Under the circumstances, the remarks of the court in *Lea* v. *Paterson*, 142 F. 2d 932 (5th Cir. 1944) are particularly appropriate (at 935)."

[13] The minutes of defendants' proceedings state, however, that laintiffs' and other cases caused defendants' legal fees to rise "to astronomical figures" (122a).

> 2. Plaintiffs have created a fund designated for convenience a "reimbursement fund." This fund consists of money collected unlawfully by defendants since the time when decisions and judgments of the district court first gave to defendants authoritative notice of the illegality of the exactions [Reimbursement fund theory].

Following argument of the application and submission of briefs, the district judge wrote (112a-113a) to the respective counsel requesting comments on six points: (i) The necessity, as a prerequisite to the award of counsel fees, of the creation or preservation of a fund in the light of certain cases therein cited (112a); (ii) The causal relationship, if any, between the *Cutler* decision and the abolition of the 10% traveling surcharge at the 1963 convention (112a); (iii) The benefit to the sidemen, if any, and its casual relationship to the *Cutler* decision, if any, of the union's "present practice"[14] of paying to the travel-

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[14] We deny there is any such practice and that prior to the *Cutler* decision the surcharge was paid by the sidemen. The district court appears to be unaware that this court had struck down the ". . . paid but do not actually receive" finding. See footnote 6, p. 4, *supra*.

Defendants were not similarly in the dark. In their Petition For Rehearing filed in this case May 15, 1963, with the Second Circuit, defendants state (p. 2):

> "This Court, however, affirmed the decision below upon the grounds that the 'leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share'; 'that the [traveling surcharge] (sic) is never deducted from the sideman's wages'; and finally, that the leader is here required to pay further exactions on a basis entirely different from that of other union members.'
>
> "The foregoing statements are squarely contrary to the Findings of the District Court that the Local 802 tax and the traveling surcharge are imposed on the sidemen's earnings; that the amounts are in fact deducted from the sideman's wages, and, finally, that the leader is collecting and paying over his and the sideman's union obligations."

The district court's opinion falls into the same error.

ing musicians the full 10% above scale rather than exacting the surcharge, as was the practice prior to the *Cutler* decision (112a); (iv) the benefit, if any, to the union and the employers by the *Cutler* decision in preventing conduct made criminal by section 302(d), in the light of *Abrams* v. *Textile Realty Corp.*, 97 N.Y.S. 2d 492, 496 (S. Ct. 1949); (v) the significance of Cutler's seeking in 60 Civ. 2939 and 4926 to dissociate from defendants "which he alleges was benefited to the Cutler decision, and actions of plaintiff's counsel in the Cutler-Wittstein motion, decided January 31, 1964, seeking to prevent the payment of the full 10% to the sidemen" (113a)[15]; (vi) the fact that this litigation, as to the co-plaintiffs, has not been concluded (113a).

Following submission of the requested comments and additional briefs, the district court rendered the opinion (7a-22a) on which the order denying plaintiffs' motion for an allowance was entered. The Second Circuit affirmed without opinion on the opinion below.

Reasons for Granting the Writ

1. The decision of the courts below in the instant case are directly in conflict with the decisions in other Circuits (13 Stanford L. Rev. 146 (1960)).

2. The questions presented are of national importance for the protection of union members who are oppressed by unlawful conduct of union leaders where the latter, as in the instant case, stubbornly resist correction of unlawful fiscal policies. This is particularly true since the union leaders involved are not handicapped, as are the protesting union members, by lack of funds and facilities for litigation. The union leaders here had ready access to the Union treasury and to Union attorneys. Unless, in the

[15] See preceding footnote.

circumstances of this case, attorneys can look forward to allowance of counsel fees, upon the basis of a recognized criterion such as that recognized in all other jurisdictions, union members like plaintiffs will in the future find it impossible to retain counsel to prevent violation of law by union leaders unless such members can personally advance the exorbitant fees which such intensive and extensive litigation, as was here involved, entailed.

3. The decision of the District Court which was affirmed by the Court of Appeals, Second Circuit, is so impregnated with unjust and erroneous reasoning and conclusions that, unless it is reversed, it will set a dangerous precedent, which can only confirm the absolute power of union leaders over union members and deprive the latter of any practical or effective remedy for fiscal abuses not covered by Article V of the Labor-Management Reporting and Disclosure Act of 1959. The facts in this case balance the equities heavily in favor of plaintiffs' contentions, especially since these unions have so completely regimented their members, often in outright and flagrant defiance of applicable law. Defendant unions have for years (1) coerced employers like plaintiffs into union membership; (2) required all employers in the industry to agree upon and to put into practice closed shops for all employees; (3) imposed minimum price regulations upon most of the employers in the musical industry; (4) dictated the form of contract to be used by employers in the musical industry in their business dealings with the public; (5) have told these employers how many employees they must hire under union-established minimum-quota rules, whose particular terms are never the subject of any bargaining or dealing with anyone, not even with union members; (6) limit the right of employers like plaintiffs to travel in the U.S.A. in order to obtain new business; (7) refuse to bargain collectively with orchestra-leader-employers because they take the position that such employers are members of their

unions, and there is no need to bargain with them; (8) unilaterally fix wages, hours and working conditions for most of the employers in the industry without so much as even dealing with them, far less bargaining with them; (9) in many areas of the musical industry require customers of the employers to pay employee salaries directly to the union which in turn pays the employees; (10) prohibit employers like plaintiffs from lowering their prices even when they fully pay unilaterially fixed union wage scales on the ground that to do so might lower union standards; (11) exercise a total monopoly over the industry; (12) for many years and until prevented by the decision of this Court (not even the decision of the United States Court of Appeals dissuaded them) imposed unlawful exactions of traveling surcharges and local taxes upon most of the employers in the industry; (13) have backed up their regulations as aforesaid with the very real threat of strikes and boycotts and fines up to $5,000.00; to say nothing of expulsions, which in view of their power and monopolistic control mean for all practical purposes the end of a musical career.

In such a context mere intra-union protest is nothing better than a forelorn hope. Recourse to litigation is necessarily expensive because of the obdurate manner in which the Unions' leaders cling to even unlawful practices until the last decision of the highest court.

The decision below has compounded together the rule governing the allowance of fees as part of adversary party costs with that governing an allowance in labor union regulatory actions; and the rule in the latter case with that governing allowances in fund cases, such as *Sprague, supra.* Thus, while professing to promote the purpose of insuring access to the courts, by misapplying the rules, the decision below acts against all the precepts of those rules. Review by this court is essential to resolve and clarify the important issues and conflict presented.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York City, February 21, 1967.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civil 2552

OPINION

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a ALLEN MERITT), and ANGIE BOND, et al.,

Plaintiffs,

against

AMERICN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,

Defendants.

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Appendix A.

LEVET, D. J.

Plaintiffs presently seek to establish "defendants' liability for the legal fees of, * * * Godfrey P. Schmidt," their attorney. The disposition of the present motion can be adequately understood only with a knowledge of the entire course of litigation between these plaintiffs and defendants.

The plaintiff Ben Cutler together with many of his co-plaintiffs in this and a variety of actions are members of the defendant unions and orchestra leaders in both the single and steady engagement fields.[1] Alleging themselves to be the employers of the union-member-musicians in their orchestra, they seek to operate free and clear of certain union regulations.

The present case is itself a sequel to Carroll v. American Fed. of Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962), aff'd 316 F. 2d 574 (2d Cir. 1963) [hereinafter Carroll 302 action], in which orchestra leaders, similarly circumstanced to the plaintiffs in this action, sought to enjoin the parent Federation and its Local 802 from demanding from the plaintiffs the Federation's 10% traveling surcharge, Local 802 1½% tax and contributions to Local 802's Single Engagement Welfare Fund, which the *Carroll* plaintiffs contended were violative of Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 USC 186. Although ultimately holding that the *Carroll* plaintiffs lacked standing to challenge the taxes, I found the method of collecting these taxes, surcharges and contributions violative of Section 302.

Basically, the Federation's 10% traveling surcharge required Federation members who performed "miscellaneous out-of-town engagements" to be paid but not to actually

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[1] For a definition of these terms of art, see Cutler v. American Fed. of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962), aff'd 316 F. 2d 546 (2 Cir.), cert. denied 375 U. S. 941 (1963).

receive an amount equal to 10% of the minimum wage established by the Local in whose jurisdiction the engagement takes place. The Federation By-Laws required either the Local or the orchestra leader to collect the 10% and transmit it to the Federation. The Federation retained 4/10ths of the traveling surcharge, an equal amount was returned to the Local in whose jurisdiction the engagement was played and the remaining 2/10ths was returned to the orchestra leader.

The present action followed shortly after the dismissal of the Carroll 302 action and was originally brought by Cutler and six other named plaintiffs in their own behalf and as representatives of a class of all orchestra-leader-employers. After the granting of a preliminary injunction, the parties stipulated that, based upon the trial record of the Carroll 302 action and other material documents, "this court shall make findings of fact and conclusions of law and shall direct the entry of appropriate judgment but solely with respect to (a) the cause of action asserted by the plaintiff Ben Cutler, and (b) the class action alleged in the complaint herein." The resulting final judgment enjoined the defendants from collecting the challenged taxes from the plaintiff Cutler in the single engagement field and dismissed the class action alleged in the complaint. The judgments on both the preliminary and permanent injunctions were affirmed by the Court of Appeals, 316 F. 2d 546 (2d Cir.), and certiorari denied, 375 U. S. 941 (1963). Successive applications for intervention, made both during and after the appellate proceedings, have burgeoned the ranks of the plaintiffs to their present number of over 100.

In the light of the *Cutler* decisions, the Federation decided at its annual convention in June, 1963 to revise its fiscal policies by abolishing the 10% traveling surcharge and substituting therefor an increase in the per capita dues of its approximate 282,000 members. A group of union

members, including the plaintiff Cutler, successfully enjoined that portion of the convention's Resolution No. 11 which increased the per capita dues as violative of Section 101(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 USC 401. Wittstein v. American Fed. of Musicians, 223 F. Supp. 27 (S.D.N.Y.), aff'd 326 F. 2d 26 (2d Cir. 1963), cert. granted 376 U. S. 942 (1964). As part of Resolution No. 11, but unaffected by the Wittstein decision, was a provision which established "minimum wages for traveling engagements at 10% in excess of applicable local scale." Subsequently, the plaintiffs in this action and Wittstein sought unsuccessfully to enjoin this provision. Cutler v. American Fed. of Musicians, 49 CCR Lab. Cas. ¶ 18,821 (S.D.N.Y. 1964).

Simultaneous with the foregoing, the plaintiff Cutler, together with two of his co-plaintiffs in this case, successfully intervened in two companion actions brought by the original Carroll 302 plaintiffs challenging certain union regulations as violative of the anti-trust laws. Carroll v. American Fed. of Musicians, 33 F.R.D. 353 (S.D.N.Y. 1963). The proposed intervenor's complaint sought a permanent injunction:

> "(b) requiring defendants to terminate union memberships of all members who are orchestra-leader, employers."

The plaintiffs' attorney in all these cases has been Godfrey P. Schmidt, Esq.

The plaintiff Cutler is also President of the National Association of Orchestra Leaders (NAOL). The other officers are Eddie Wittstein, Vice-President, Joe Carroll, Secretary, and Charles Peterson, Treasurer, all of whom have been plaintiffs in one or more of these actions. Among NAOL's Board of Directors are Di Rienzo, Greco, Levitt and Kenton, all of whom have also been plaintiffs in one

or more of these actions. NAOL itself is apparently a nationalized successor to Orchestra Leaders of Greater New York (OLGNY), a group which was a plaintiff in the Carroll 302 action and as to which I found, 206 F. Supp. at 464-65:

> "2. Although plaintiff Orchestra Leaders of Greater New York ('OLGNY') is alleged to be an informal unincorporated association comprising at least 50 members of a class allegedly represented by plaintiffs Carroll and Peterson, I find that there is a lack of evidence establishing that OLGNY is an association representing orchestra leaders, that it is presently in existence, that it has any members other than Carroll and Peterson, that it has in any way been damaged or aggrieved by any conduct of defendant unions or that it has any interest in these actions."

While apparently limited in membership, OLGNY filed several unfair labor practice charges against the Federation charging, among other things, that the defendants "force or require employers or self-employed persons, to wit, members of Orchestra Leaders of Greater New York to join a labor organization, to wit, Associated Musicians of Greater New York, Local 802, and American Federation of Musicians of the United States and Canada," (Ballard Aff. Ex. 5) and against Local 802 asserting that it "imposes minimums for all engagements in the single engagement field." (id. Ex. 19)

NAOL has recently also field unfair labor practices charges against the defendants alleging the unilateral imposition of wage scales without collective bargaining. (Ballard Aff. Ex. 12) Ben Cutler, as President of NAOL, has written several letters to the Federation seeking the refund of previously collected surcharges and offering to collectively bargain with the union. (id. Exs. 14, 23) NAOL has

also written, over the signature of Charles Peterson, several letters to other orchestra leaders and Locals of the Federation charging that certain taxes and their methods of collection are illegal. (id. Exs. 25, 26, 27, 29)

Recently, two other actions were begun, in both of which Cutler is a plaintiff. The first, Bond v. Harris, 63 Civ. 3315, challenges certain contracts negotiated by Local 802 and the Hotel Association of New York City governing musical services to be performed in hotels. See 228 F. Supp. 265 (S.D.N.Y. 1964). In the other action, Kenton v. American Fed. of Musicians, 64 Civ. 1273, orchestra leaders seek the refund of monies previously collected by the Federation as traveling surcharges. In both actions Godfrey P. Schmidt represents the plaintiffs.

The plaintiffs have limited their present application to counsel's work in the preparation and trial of the Carroll 302 actions, the obtaining of a final injunction with respect to the plaintiff Cutler in this action and the completion of the *Wittstein* case. (Schmidt, Jan. 8 Aff., pp. 6-7) It is stated that no claim beyond the present application will be made by plaintiffs or their counsel for any fees for legal work made necessary in completing the trial of this action.

I.

One begins with the rather well-settled rule recently reiterated by the Court of Appeals of this circuit, Fleisher v. Paramount Pictures Corp., 329 F. 2d 424, 426 (2d Cir. 1964):

> "* * * American courts have traditionally refused to include counsel fees in a losing party's bill of costs, except in the most extraordinary of instances, and have virtually never awarded such fees in an action at law. Every litigant, regardless of the seeming frivolity of his claims, is entitled to have them determined on their merits, and not to be 'taxed out of court.'"

This rather rigid rule has been somewhat relaxed by the "historic equity jurisdiction of the federal courts" to award counsel fees in exceptional cases. Sprague v. Ticonic Nat'l Bank, 307 U. S. 161, 164 (1939) (Frankfurter, J.). As the plaintiffs concede, the present application is not premised upon any statutory provision[2] and rests entirely upon the "* * * authority of the chancellor to do equity in a particular situation. * * *" Sprague, supra, 307 U. S. at 167. The plaintiffs' claim is two-fold. First, that the plaintiffs have created what is optimistically referred to in the affidavits as a "reimbursement fund" consisting of the monies defendant Federation unlawfully collected as "10% traveling surcharge." Second, that the plaintiffs by their action have not only benefited themselves, but also all orchestra-leader-employers, and, in fact, the parent Federation, its Locals and all its members.

II.

The so-called "reimbursement fund" is alleged to consist of the monies "collected unlawfully by defendants since the time when decisions and judgments of this Court first gave to defendants authoritative notice that plaintiffs had properly construed Section 302 in the initial complaints against defendants." The short answer to this contention is that if the reimbursement fund consists of monies

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[2] Compare, for example, the provision in Title V of the Landrum-Griffin Act. 73 Stat. 535, 29 USC § 501(b):

> "* * * The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

See Note, Counsel Fees for Union Officers Under the Fiduciary Provision of Landrum-Griffin, 73 Yale L. J. 443 (1964).

illegally collected by the defendants, that fund was not created or preserved by the plaintiffs, but, rather, accumulated over their strenuous objections and in spite of their efforts. It is difficult to visualize a fund being created by a judgment which permanently enjoins the defendants from collecting certain surcharges in a proscribed manner.

Furthermore, there is substantial doubt whether the *Cutler* decision established any fund by *stare decisis*. The *Cutler* decision was effectively limited to the plaintiff Cutler in the single engagement field. The decision did nothing to establish the rights of the over 100 intervenors, much less establish the rights of all orchestra-leader-employers, alleged to number over 5,000. As to many of these claims the Federation unquestionably has defenses, among which is lack of standing either as an employer or as a member of the Federation. In such circumstances, no fund within the meaning of the *Sprague* doctrine has been established. See Whittier v. Emmet, 281 F. 2d 24 (D. C. Cir. 1960), cert. denied 364 U. S. 935 (1961).

Lastly, in three basic requirements established by the decisions charging counsel fees of successful litigants against a fund are absent here:

First: A definite earmarked fund must be unconditionally created, preserved or maintained as a result of plaintiffs' action. See, Trustees v. Greenough, 105 U. S. 527 (1882); Buford v. Tobacco Growers' Co-Op Ass'n., 42 F. 2d 791 (4th Cir. 1930); Wallace v. Fiske, 80 F. 2d 897 (8th Cir. 1935); City of Wewoka v. Banker, 117 F. 2d 839 (10th Cir. 1941); O'Hara v. Oakland County, 136 F. 2d 152 (6th Cir. 1943); Lafferty v. Humphrey, 248 F. 2d 82 (D. C. Cir.), cert. denied 355 U. S. 869 (1957); Doherty v. Bress, 262 F. 2d 20 (D. C. Cir. 1958), cert. denied 359 U. S. 934 (1959).

Second: The decision affecting the fund must establish rights in the fund. See Sprague v. Ticonic Nat'l Bank, 307 U. S. 161 (1939); Whittier v. Emmet, supra.

Third: The persons having an interest in the fund must expressly or impliedly accept the benefits derived from the plaintiffs' litigation. See Hobbs v. McLean, 117 U. S. 567 (1886); Lea v. Paterson Sav. Inst., 142 F. 2d 932 (5th Cir. 1944); Abbott, Puller & Myers v. Peyser, 124 F. 2d 524 (D. C. Cir. 1941).

For the foregoing reasons, the plaintiffs' application based on the creation of a fund is denied.

III.

With the possible exception of civil rights litigation, see Bell v. School Bd., 321 F. 2d 500 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964), no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally pits an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one. This recogniztion has prompted several courts to allow counsel fees to successful union members who through litigation have corrected union abuse even though they have not established a fund or conferred a pecuniary benefit upon the commonweal of the union. Murray v. Kelly, 14 App. Div. 2d 528, 217 N.Y.S. 2d 146 (1961), aff'd 11 N. Y. 2d 810, 182 N. E. 2d 109 (1962); Milone v. English, 306 F. 2d 814 (D. C. Cir. 1962); Fittipaldi v. Legaisse, 18 App. Div. 2d 331, 239 N.Y.S. 2d 792 (1963); Gilbert v. Hoisting & Portable Eng'rs, 384 P. 2d 136 (Ore. 1963), cert. denied 376 U. S. 963 (1964). Cf. Grein v. Cavano, 61 Wash. 2d 498, 379 P. 2d 209 (1963). This development is in full keeping with the "historic equity jurisdiction of the federal courts." Sprague, 307 U. S. at 164. However, "such allowances are appropriate only in exceptional cases and

for dominating reasons of justice." id at 167. It remains to determine whether this is such a case.

The plaintiffs allege that their actions have benefited not only themselves but also other orchestra-leader-employers, and, in fact, the Federation, its Locals and all its members. The monetary savings to other orchestra leaders resulting from their present freedom from these exactions is variously alleged to be in the millions. While one would little doubt the substantial savings to the plaintiffs themselves and those similarly circumstanced, including the more than 100 intervenors, there seems little reason to impose an additional liability on the defendants to pay counsel fees to a group whose action brought to themselves such affluent savings. Putting aside however, the benefit which the plaintiffs have brought upon themselves and those in similar positions, their claim of benefit to the Federation and its membership comes with somewhat of a hollow ring.

It is difficult to imagine that the *Cutler* decision was not at least a significant, if not the determinative, factor in the Federation's decision to revise its fiscal policies. While the Federation unquestionably had alternatives, "[t]he very fact that these reforms were made after the initiation of legal action, leads to the reasonable inference that such reforms were caused by the initiation of such legal action." Grein v. Cavano, supra, 379 P. 2d at 215.

The *Cutler* decision held that Cutler, when acting as an employer in the single engagement field, violated Section 302 of the Labor-Management Relations Act, as amended, 29 USC 186, when he transmitted to the Federation the 10% traveling surcharge. Subsection (d) of the same section makes it a misdemeanor to violate the section. While the plaintiffs contend that their actions prevented potential criminal prosecution of their union, a mere reading of Section 186(d) makes clear that the criminality applies equally to both the employer and the union officials. See United States v. Roth, 2 Cir. June 5, 1964 [employers];

United States v. Holt, 2 Cir. June 5, 1964 [union official]. The plaintiffs were quite obviously substantially benefiting themselves by preventing their own, as well as their unions, potentially criminal conduct. While the law cannot but recognize as beneficial full observance of the law, cf. Abrams v. Textile Realty Corp., 97 N.Y.S. 2d 492, 496 (Sup. Ct. 1949), there exists no compelling reason to have the defendants pay counsel fees for such a mutual benefit.

The fiscal policy enacted after the *Cutler* decision reaffirmed the practice of paying traveling musicians 10% above scale. While this was an unquestioned benefit to the instrumentalists (sidemen) in traveling orchestras, the plaintiffs can claim little credit for this. Even assuming a casual relationship between the *Cutler* decision and this action of the Federation, the plaintiffs attempted in this court to enjoin this provision.

In fact, the plaintiffs' claim that their actions benefited the membership of the union must be placed against the entire panorama of their actions. This action was not brought as a class action of the entire membership of the union, but as representative of orchestra-leader-employers. The plaintiff Cutler presently seeks to sever his membership in the union, the very group alleged to have benefited by his actions. As President of NAOL he has sought collective bargaining between himself and the union. NAOL has filed unfair labor practice charges against the defendants. Cutler and other plaintiffs have instituted a variety of actions challenging various practices of the union. The predecessor of NAOL, OLGNY, has similarly waged a campaign against the union which the plaintiffs allege they have presently benefited. No words more aptly express this controversy than those of the court in Lea v. Paterson Sav. Inst., 142 F. 2d 932, 935 (5th Cir. 1944):

> "* * * This melee, this long drawn out fight, this knock down and drag out fight, has none of the aspects

of a class suit. The claim that its progress or result has afforded any basis for a finding that the consenting creditors who were locked in a death struggle with petitioner, were also consenting to representation by him, or that they have received such benefits from this long drawn out fight, that, though having counsel of their own, they must pay those who forced the fight on them and have carried it on so relentlessly, is wholly without foundation. That no one shall enrich himself at the expense of another is a good principle. To apply it here would, under the undisputed facts, be to run a good principle into the ground."

Cf. Gabrielson v. City of Long Beach, 363 P. 2d 883, 56 Cal. 2d 224 (1961).

IV.

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. * * * As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." Sprague v. Ticonic Nat'l Bank, 307 U. S. 161, 166-67 (1939).

There exists in this case no reason for this court to impose upon the defendants liability for plaintiffs' counsel fees. No fund was created or preserved. No benefits were conferred upon the defendants sufficient to warrant the exercise of the chancellor's discretion. However salutary may be the practice of awarding counsel fees to successful union members in benefiting their union in various ways, it would be the antimony of the rule to allow such fees to plaintiffs who, alleging they have benefited the commonweal are at the same time seeking to sever their membership

and whose interests are at odds with the majority of members. For the foregoing reasons, the plaintiffs' motion is in all respects denied. Similarly, the defendants' request for their fees on this motion is denied since the motion cannot be deemed to be "unnecessary, groundless, vexatious and oppressive."

In view of the above determinations there is no necessity to pass upon the defendants' contentions that it was the Congressional desire to deny counsel fees in all actions under the Landrum-Griffin Act except those brought under Section 501.

The foregoing constitutes my Findings of Fact and Conclusions of Law, pursuant to Fed. R. Civ. P. 52(a).

Settle order on notice.

Dated: New York, N. Y., June 17, 1964.

RICHARD H. LEVET,
United States District Judge.

APPENDIX B

316 F. 2d 546

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 283—October Term, 1962
(Argued March 19, 1963 Decided April 30, 1963)
Docket No. 27946

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a Allen Meritt), and ANGIE BOND, *et al.*,

Plaintiffs-Appellees,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, J., permanently enjoining the defendants from demanding certain union "taxes" and "traveling surcharges" as prohibited by § 32 of the Labor Management Relations Act, as amended, 29 U. S. C. § 186.

Affirmed.

GODFREY P. SCHMIDT, New York, N. Y., *for plaintiffs-appellees.*

Appendix B.

EMANUEL DANNETT, New York, N. Y. (McGoldrick, Dannett, Horowitz & Golub, New York, N. Y., Herbert D. Schwartzman, Eugene Mittleman, and Jerome H. Adler, New York, N. Y., Henry Kaiser and George Kaufmann, Washington, D. C., on the brief) *for defendant-appellant American Federation of Musicians of the United States and Canada.*

DAVID I. ASHE, Ashe & Rifkin, New York, N. Y., on the brief, *for defendant-appellant Associated Musicians of Greater New York, Local 802.*

LUMBARD, *Chief Judge:*

The American Federation of Musicians of the United States and Canada and the Associated Musicians of Greater New York, Local 802 appeal from a judgment of the District Court for the Southern District of New York which permanently enjoined the defendant unions from collecting from Ben Cutler, an orchestra leader member of said Local, the 1½ percent tax or the 10 percent traveling surcharge imposed respectively by the Local's by-laws and the Federation's constitution. 211 F. Supp. 433 (S. D. N. Y. 1962). This appeal questions Judge Levet's holding that under § 302 of the Labor-Management Relations Act, 29 U. S. C. § 186, the payment of the tax and surcharge by Cutler is illegal and such payment may not be demanded of Cutler by the defendant unions. We affirm.[1]

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[1] The unions also appeal from the granting of a preliminary injunction in favor of over 70 other orchestra leaders. Judge Levet found that those leaders perform "substantially in the same fashion" as Cutler. This finding is not clearly erroneous, and since we hold the tax and surcharge illegal, we affirm the granting of the preliminary injunction as to the 70 other leaders.

Appendix B.

The facts upon which Judge Levet based the permanent injunction are not contested on this appeal.

Cutler a member of the defendant unions is an orchestra leader engaged in the so-called "single engagement" filed. In other words, he leads orchestras which perform at weddings, dances, sports event and the like; these engagements always being for less than one week.

Local 802 imposes a Local Tax of 1½ percent of the wage scale set by the union.[2] The union's by-laws require the leader to transmit to the local the "Taxes" which he is to deduct from his own wages and the wages of the other orchestra members who are known as sidemen. No sideman has signed a written authorization for such a deduction. The 1½ percent tax is not collected and transmitted if the orchestra performs outside of the jurisdiction of Local 802 which includes New York City, Nassau and Suffolk counties. But in such case, the leader is obligated, under the Federation's rules, to pay to the Federation an amount equal to 10 percent of the scale set by the local which has jurisdiction over the areas in which the performance is rendered.[3] The 10 percent is not deducted from the wages of the sidemen or the leader but is charged to the purchaser of the musical performance. Under the rules of Local 802 and the Federation, the leader is under no obligation to collect and pay over the 1½ percent or the 10 percent unless he is a member of the union.

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[2] Scale is the minimum which each performer may be paid for a performance within the jurisdiction of each local. The rule within the jurisdiction of Local 802 is that the leader must be paid at least twice scale plus eight percent of the total scale wages of the entire orchestra.

[3] The distribution of the ten percent is as follows:

Four-tenths goes to the local in whose jurisdiction the engagement was played; four-tenths is retained by the Federation; two-tenths is paid to the members who played the engagement.

Appendix B.

Each orchestra leader in the single engagement field generally plays an instrument himself. Ninety-eight percent of the performers who act as leaders on some occasions act as sidemen on others. Cutler is one of the two percent who always act as leaders. The leader negotiates contracts with purchasers of performances. The contracts are for a lump sum and do not itemize the distribution of that sum.[4] The leader distributes an amount equal at least to the union scale to each sideman, makes the required payments to the union, and keeps the remainder for himself.

Cutler brought this action on July 20, 1962 to restrain collection of the wage tax and the 10 percent surcharge. By agreement of the parties, Judge Levet used affidavits and the record in *Carroll* v. *Associated Musicians of Greater New York*,[5] wherein Cutler was a witness, as the source of the facts in this case and issued a preliminary injunction against the unions on October 17, 1962. Following further stipulation as to the use of those sources, Judge Levet made the injunction in favor of Cutler permanent on November 14, 1962, and from that judgment the defendants appeal.

Judge Levet found that Cutler, an orchestra leader in the single engagement filed, is an employer within the meaning of the statute and that as such he may not be required to pay over to the unions the taxes and surcharges here involved. We agree. Section 302 of the Labor Management Relations Act, as amended, 29 U. S. C. § 186, prohibits unions from demanding or employers from making payments to unions representing his employees

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[4] The Local's by-laws require that such contracts must be approved by the Local and the price must include at least the scale for each performer and double scale plus eight percent for the leader. see footnote 2, *supra*.

[5] The appeal in the *Carroll* case is decided this day. See —— F. 2d —— (2 Cir. 1963).

unless there is a written authorization for certain deductions from wages, and reads in pertinent part as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; * * *
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

The appellants argue that the provision of the statute which prohibits payment by the employer to any representatives of his employees is not applicable here because Cutler is not an employer. They refer us to the Form B Contract, in use since 1941, which designates the purchaser of the performance as the employer of the musicians. In actual practice, however, the leader in the single engagement field has all effective control of the orchestra;[6] he hires

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[6] We need not be concerned with those occasions when the father of the bride, at the height of his exhilaration, proceeds to lead the orchestra.

the sidemen, decides how much is to be charged for the performance and what share is to be allocated to each sideman, subject of course to union minimum charges. He also pays all the expenses of each performance, workmen's compensation, insurance premiums, withholding taxes and other taxes. We find the designation in the Form B Contract to be a self-serving subterfuge which is not entitled to any weight. See *Carroll* v. *American Fed. of Musicians,* 295 F. 2d 484, 486 (2 Cir. 1961); *cf. Cutler* v. *United States,* 180 F. Supp. 360, 362 (Ct. Claims 1960). We agree with Judge Levet that Cutler is an "employer" for the purposes of § 302.

The appellants urge, however, that even if Cutler is an employer, he is also a union member and as such, he has certain duties to the union, including paying over the charges involved in this action. In other words, the leader's membership in the union enables the union to impose duties upon him which are inconsistent with what is prohibited him as an employer under § 302. Appellants point out that non-members are not required by the union to pay over the taxes.

We do not agree that the leader's membership in the union immunizes him from the limitations which § 302 imposes upon him because of his being an employer. He is not merely performing a ministerial task for the union, that is, collecting and paying over his and the sidemen's dues and exactions. In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share. It is true that union regulations require the 1½ percent to be deducted from the scale wage. But the actual amount paid to sidemen is often above scale, dependent entirely upon bargaining between the leader and each sideman.[7] The

[7] There is no collective bargaining in this industry.

requirement that the leader turn over the tax is undoubtedly considered in arriving at the payment, obviating the need for any deduction.[8] It is clear that the 10 percent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages. In fact two percent of the scale wage is ultimately paid over to the sidemen.[9]

The unions argue that leaders may become members and pay union exactions even if they are self-employed, because they are in wage or job competition, or economic interrelationship with other union members, see *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U. S. 94, 103 (1962). This is true so far as the payment of dues is concerned. But the leader is here required to pay further exactions on a basis entirely different from that of other union members. We hold that the unions' demand for the 1½ percent wage tax and the 10 percent surcharge payment violates § 302.

Finally, appellants contend that the impositions did not relate to "an industry affecting commerce." Judge Levet found that the single engagement field is an industry affecting commerce, 211 F. Supp. at 442, and we agree for the reasons he stated there. See *Carroll* v. *American Fed. of Musicians,* 295 F. 2d 484, 487 (2 Cir. 1961).

The judgment of the district court is affirmed.

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[8] For example, if the union scale were $50, and the sideman were paid the scale wage, $.75 would be deducted from his pay leaving $49.25. But if the leader agrees with the sideman that the latter is to "clear" $50, the tax is not deducted, but is paid by the leader.

[9] See footnote 3. This is paid through the leader, as the union keeps little or no record of the musicians in whose behalf the leader pays the tax.

APPENDIX C

295 F. 2d 484.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 108-111—September Term, 1961.

(Argued September 28, 1961 Decided October 17, 1961.)

Docket Nos. 27013-16

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said FEDERATION, STANLEY BALLARD, as Secretary of said FEDERATION, and GEORGE V. CLANCY, as Treasurer of said FEDERATION, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802, and HI JAFFE, as Treasurer of LOCAL 802,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appendix C.

Plaintiffs appeal from the denial by the District Court for the Southern District of New York, Edmund L. Palmieri, *J.*, of a temporary injunction to restrain certain practices of musicians' unions and their officers. Reversed to extent indicated, otherwise affirmed.

GODFREY P. SCHMIDT, New York, New York, *for Plaintiffs-Appellants.*

DAVID I. ASHE (Ashe & Rifkin), New York, New York, *for Defendants-Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiffs are orchestra leaders and members of an unincorporated association known as Orchestra Leaders of Greater New York; they also are members of defendant American Federation of Musicians of the United States and Canada, an international union, and of the New York local, defendant Associated Musicians of Greater New York, Local 802, as, allegedly, union rules require them to be. The business of plaintiffs and the other orchestra leaders they claim to represent is the "single engagement" field. This consists of single performances on occasions such as weddings, college or high school dances, business conventions, club entertainments and the like, in contrast to the "steady engagement" field where musicians are hired on a long-term basis by employers such as television stations, hotels, restaurants, night clubs, and opera or symphony associations. In the "single engagement" field, the person or organization desiring the performance solicits, or is solicited by, an orchestra leader; the latter in turn obtains the musicians, called sidemen, who are to assist in fulfilling the engagement.

Appendix C.

Plaintiffs on behalf of themselves and other orchestra leaders have brought four actions against the defendant unions and the latter's officers in the Southern District of New York, which have now been consolidated for trial. One of these, *Carroll* v. *Associated Musicians of Greater New York,* challenged a welfare fund promulgated by Local 802 as violating § 302 of the Labor-Management Relations Act, 29 U. S. C. § 186; a temporary injunction granted by Judge Dimock, 183 F. Supp. 636 (S. D. N. Y. 1960), was affirmed by this Court, 284 F. 2d 91 (2 Cir. 1960). Two actions attacked the unions' practices of establishing price lists and employment quotas as violating the antitrust laws; a motion for a preliminary injunction in one was denied by Judge Bryan in October, 1960, and a similar motion in the other was marked off for excessive adjournment in January, 1961. The fourth action challenged, under § 302 of the Labor-Management Relations Act, a "tax," at one time 2% and later reduced to 1½%, which a by-law of Local 802 required leaders to deduct from amounts received for the services of members and pay to the Local, and a 10% "traveling surcharge," which Article 15 of the Constitution of the International required leaders to add to the price of engagements played by members outside the jurisdiction of their home local and pay to the International.

Plaintiffs' motion, dated March 21, 1961, which has given rise to the order here under review, was entitled in all four actions. It sought a temporary injunction against collection of the "tax" and the "traveling surcharge," and also against the defendants' visiting upon plaintiffs and other orchestra leaders "any economic or other reprisals (except expulsion from union membership or other purely intra-union penalty) because of their participation in the above-entitled actions or because of their failure to comply with the union laws and regulations whose legal validity is challenged in the complaints in the above-entitled actions;

and from interfering, directly or indirectly, in any way whatsoever, with the business, employment, engagements, jobs or work opportunities of plaintiffs or the class they represent, and from precluding interrupting or interfering with the rights of plaintiffs or any of them to work as musicians in any place or upon any job or engagement whatsoever." Judge Palmieri denied the motion, holding that "Complex and weighty issues of law and of fact are presented in these suits and serious economic interests of both sides are at stake," that "The voluminous papers submitted on these motions emphasize the need for a thorough and careful appraisal of the facts by a trial court"; that "the injunctions sought by the plaintiffs would disrupt strongly entrenched practices and procedures of the defendants with consequent uncertainty as to work and compensation patterns affecting many thousands of members belonging to the defendant unions"; that if a trial should result unfavorably to the plaintiffs, "there would be no adequate way to repair the harm done or account for the wages and jobs that may have been lost"; and that "the immediate benefit that could accrue to the plaintiffs by the granting of threshold injunctive relief does not outweigh the corresponding detriment that would be suffered by defendants should plaintiffs fail to prove their claims." Plaintiffs appeal from this denial, 28 U. S. C. § 1292(a)(1).

These reasons for refusing interlocutory relief that would interfere with the long-established system for establishing wage scales and employment quotas appear entirely sound. However, we are unable to find similar basis for refusing the injunction with respect to the "tax" or the "traveling surcharge" or to "reprisals" for failing to make such payments.

Section 302(a) of the Labor-Management Relations Act, as amended by § 505 of the Labor-Management Reporting and Disclosure Act of 1959, makes it "unlawful for any

employer * * * to pay, lend, or deliver, or to agree to pay, lend, or deliver, any money or other thing of value * * * to any representative of any of his employees who are employed in an industry affecting commerce," or "to any labor organization, or any officer or employee thereof" which represents any such employees. Although defendants deny that the orchestra leader is the "employer" of the sidemen and claim the father of the bride is the true employer, as indeed the contract form says, we think this contention, far from being serious or difficult, borders on the frivolous for reasons stated in another connection by the Court of Claims in *Cutler* v. *United States,* 180 F. Supp. 360, 362 (1960),—an opinion followed by Judge Dimock in his decision in *Carroll* v. *Associated Musicians of Greater New York, supra,* which we affirmed. There is, of course, no denial that the defendant unions are representatives of employees and are labor organizations representing employees.

Hence the only remaining question with respect to the applicability of § 302(a) to the tax and the surcharge is whether the "single engagement" field is "an industry affecting commerce." The verified complaints, incorporated by reference in the motion, alleged that plaintiffs and the class they represent "frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located" and that the revenues from such engagements run into millions of dollars a year. The answering affidavits did not challenge this but contented themselves with reliance on this Court's statement on the earlier appeal, 284 F. 2d at 92, that "The degree to which the sidemen employees of the leaders were 'employed in an industry affecting commerce' * * * is an issue which can be more satisfactorily resolved on a full trial of the case." Defendants argue that, just as limitations on the scope of review of interlocutory orders lay

behind our affirmance of Judge Dimock's preliminary determination that he was sufficiently satisfied of an effect on commerce, the same limitations require affirmance of what they consider Judge Palmieri's preliminary determination that he was not. Apart from the seemingly capricious results to which this argument leads, it overlooks that the issue with respect to "commerce" in the action relating to the welfare fund was considerably more troublesome than here. What had concerned Judge Dimock and led to our remark as to resolution by a trial was that Local 802's welfare fund regulations applied only to engagements within New York City and Nassau and Suffolk Counties, in New York state, 183 F. Supp. at 638; there was thus a question whether activities of the industry crossing state lines could be considered. Here there is no such question. The Local's by-law imposing the "tax" and the provision of the International's Constitution imposing the "traveling surcharge" are not limited to engagements within the state; indeed, the latter applies only to engagements outside the Local's own jurisdiction, many, if not most, of which would be outside the state of New York. The case with respect to interstate commerce is thus immeasurably stronger than that before Judge Dimock; and if we were preliminarily satisfied of an effect on commerce there, we must surely be so here. We hold that defendants have thus far failed to raise any substantial issue that these two impositions did not relate to "an industry affecting commerce," *United States* v. *Shubert*, 347 U. S. 222 (1955).

It follows that, on the showing before the District Judge, the tax and the surcharge violated § 302(a)[1] unless they

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[1] This is subject to possible qualification with respect to so much of the 10% "traveling surcharge" as ultimately went to the performers themselves, with the International acting only as a conduit, a question we find unnecessary to decide.

came within one of the exceptions of § 302(c). The only exception in any wise pertinent is subsection (4) which permits an employer to deduct from wages money constituting "payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment * * *" From what we have before us it would seem indeed that the "tax" imposed by the Local's by-law may have constituted the payment of membership dues although not denominated as such; however, defendants did not bring themselves within the exception since there were not written authorizations. Normally the 10% "traveling surcharge" is divided by the International three ways: 4/10ths goes to the local in whose jurisdiction the engagement was played, 4/10ths is retained by the International, and 2/10ths is paid to the members who played the engagement. The distribution to the local and to the employees themselves would seem quite clearly not to constitute membership dues. We are unable to determine from the material before us whether the payment to the International would be such but in any event no written authorizations were furnished.

The general considerations marshalled by the District Judge against the grant of temporary injunctive relief, which we find persuasive with respect to the union provisions as to salary scales and employment quotas, do not appear pertinent to the collection of the apparently illegal "tax" and "surcharge"; doubtless the sheer mass of papers and argument tended to distract the judge's attention from this single aspect of the case. It is true that plaintiffs apparently suffer no out-of-pocket loss from the tax and the surcharge on the sidemen, since the tax is deducted from the musicians' salaries and the surcharge is added to the price to the customer; however, if plaintiffs are right as to the illegality of these payments, as they

seem to be, their conduct renders them subject to § 302(d), which makes them guilty of a misdemeanor carrying a fine of not more than $10,000, or imprisonment for not more than a year, or both. Defendants suggest that this sensitivity of the plaintiffs to criminal liability is somewhat recent; however, a court of equity ought not deny interlocutory relief to a person seeking its aid in terminating his criminal conduct simply because repentance has been late and may not have been motivated solely by respect for law. Neither will an injunction relating only to these payments entail the destructive consequences on employment feared by the District Judge; such detrimental effect as the injunction might otherwise have on the unions can be substantially cushioned by a provision, suggested by him and accepted by plaintiffs, that the amounts claimed by defendants to be collectible as "tax" and "surcharge" shall be paid into escrow, and by a further provision that the "tax" should continue to be paid directly to the Local to the extent that leaders are furnished with written authorizations complying with § 302(c).

Since plaintiffs were entitled to an injunction against being required to pay the apparently illegal tax and traveling surcharge, they were likewise entitled to protection against interference for failing to make such payments. They complain also of the denial of an injunction against reprisals for instituting and prosecuting the four actions. Appellees say there have been none for that cause, the only disciplinary action taken against plaintiffs and consequent threats to them having stemmed from nonpayment of the "tax" and "traveling surcharge" or other breaches of union regulations. Appellants' evidence does not negate this sufficiently to warrant us in reversing the denial of the broader injunction sought. An injunction limited to the payments and to reprisals for failure to make them, which should also direct appellees to retract any threats to musicians and

prospective customers already made on that ground, is all that has been clearly shown to be required; if defendants should attempt reprisals against the plaintiffs for bringing or prosecuting the actions, a further application can be made and relief promptly given.

In holding that a temporary injunction should have issued to the extent indicated, we are not unmindful that, as Judge Sanborn stated a half century ago, it is "to the discretion of the trial court, not to that of the appellate court, that the new intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?" *Love* v. *Atchison, T. & S. F. Ry.*, 185 F. 321, 331 (8 Cir. 1911). However, that does not mean that denial of a temporary injunction is to be free from review. Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. 666 (1895),[2] and then of repeating the process when it enacted § 129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660 (1900) in this respect, unless it had thought that meaningful duties were being imposed upon the Courts of Appeals. Moreover, as said by Chief Judge Magruder, "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weigh-

[2] This was done because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions," "had not been adequately considered," Frankfurter and Landis, The Business of the Supreme Court, 108-109.

ing of the relevant factors," *In re Josephson,* 218 F. 2d 174, 182 (1 Cir. 1954); see, to much the same effect, Judge Learned Hand in *Barnett* v. *Equitable Trust Co.,* 34 F. 2d 916, 920 (2 Cir. 1929). In *Ring* v. *Spina,* 148 F. 2d 647 (2 Cir. 1945), this Court reversed the denial of a temporary injunction founded on what the Court tentatively considered an erroneous view of the law; such a reversal occurred also in *Perry* v. *Perry,* 190 F. 2d 601 (D. C. Cir. 1951), where the denial below had been predicated on what the Court of Appeals regarded as an unduly restrictive interpretation of a contract. See also *National Grain Yeast Corp.* v. *City of Crystal Lake,* 147 F. 2d 711 (7 Cir. 1945); *Chicago, R: I. & P. R.R.* v. *Switchmen's Union,* 292 F. 2d 61, 71 (2 Cir. 1961). Such considerations and authorities suffice to support reversal of the order to the limited extent of directing issuance of a temporary injunction consistent with this opinion; the detailed framing of the injunction is properly left to the District Judge. In order to expedite the entry of such an injunction, the mandate will issue forthwith.

APPENDIX D

284 F. 2d 91 (2d Cir.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 34—October Term, 1960.

(Argued September 28, 1960 Decided November 17, 1960.)

Docket No. 26278

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, ORCHESTRA LEADERS OF GREATER NEW YORK,

Plaintiffs-Appellees,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK and AL MANUTI, as President, MAX L. ARONS, as Secretary and HI JAFFEE, as Treasurer of LOCAL 802, ASSOCIATED MUSICIANS OF GREATER NEW YORK,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
TUTTLE* and FRIENDLY, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, E. J. Dimock, *J.*, granting temporary injunction forbidding defendant Local to institute a "single engagement welfare plan." Affirmed.

* Of the Fifth Circuit, sitting by designation.

Appendix D.

SCHMIDT & MCDONALD (Godfrey P. Schmidt, on the brief), *for Plaintiffs-Appellees.*

ASHE & RIFKIN (George Rifkin, on the brief), *for Defendants-Appellants.*

TUTTLE, *Circuit Judge:*

Associated Musicians of Greater New York and its officers appeal from the grant of a temporary injunction forbidding them to put into effect a "single engagement welfare plan" which concededly involved payments which would be violative of Section 302 (a) of the Labor Management Relations Act as Amended, 29 U. S. C. A. §186, assuming the correctness of the facts found by the trial court. The provisions of the Labor Management Relations Act here invoked are:

> §186. "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> * * * * *
>
> "(e) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That * * * (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and

employees and employers are equally represented in the administration of such fund * * *."

The plaintiffs are members of the defendant Union, Local 802, which has some 30,000 members. They are also members of a smaller Union, Orchestra Leaders of Greater New York, all of whose members are also in Local 802, but who have the further identifying characteristic of being band or orchestra leaders in addition to, or rather than, plain musicians or sidemen. The executive Board of Local 802 put into effect a plan to provide welfare benefits for its members engaged in the single engagement field. This activity involves the selection by a leader of individuals to play at single engagements. A band leader may use the same musicians or sidemen repeatedly or he may engage different musicians from time to time. The plan thus sought to be enforced by the defendants required that the leader charge the purchaser of the music, i.e., the father of the debutante or of the bride, or the college fraternity, etc., an amount above the regular charge for the band which would give him one dollar per musician per performance. This sum he would then be required to pay over to the officers of Local 802, as trustees.

The trial court held that the leaders were, on the proof before him, the employers of the sidemen; that the musicians were "employed in an industry affecting commerce"; that the welfare fund was to be administered only by the defendant union officers; that, as an interlocutory finding, therefore, the plaintiffs, as leaders, could not legally pay this money over to the individual defendants as officials of the Union, which was the representative of the sidemen employed by the leaders.

Having in mind the very limited scope of review of Courts of Appeals in such an interlocutory order as a preliminary injunction, *Joshua Meier Co.* v. *Albany Novelty Mfg. Co.*, 2 Cir., 236 F. 2d 144; *American Visuals Corp.* v.

Holland, 2 Cir., 219 F. 2d 223; *Mansfield Hardwood Lumber Company* v. *Johnson*, 5 Cir., 242 F. 2d 45, we are constrained to affirm the order of the trial court.

The degree to which the sidemen employees of the leaders were "employed in an industry affecting commerce" (the main point of appellants' attack on the order below), is an issue which can be more satisfactorily resolved on a full trial of the case. The degree of such effect found by the trial court here, while perhaps more restricted than justified on the proof, was nevertheless sufficient to support his grant of the preliminary injunction.

Substantially all other facts are without dispute. The judgment is AFFIRMED.

APPENDIX E

316 F. 2d 546

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 112-3-4-5—October Term, 1962
(Argued October 3, 1962 and March 19, 1963
Decided April 30, 1963)
Docket Nos. 27769-72

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, ORCHESTRA LEADERS OF GREATER NEW YORK,
Plaintiffs-Appellants,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK and AL MANUTI, as President, MAX L. ARONS, as Secretary, and HI JAFFE, as Treasurer of LOCAL 802, ASSOCIATED MUSICIANS OF GREATER NEW YORK,
Defendants-Appellees.

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, ORCHESTRA LEADERS OF GREATER NEW YORK,
Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said Federation, STANLEY BALLARD, as Secretary of said Federation, and GEORGE V. CLANCY, as Treasurer of said Federation, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802, and HI JAFFE, as Treasurer of LOCAL 802,
Defendants-Appellees.

Appendix E.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and KAUFMAN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, J., dismissing the complaints in two actions on the ground that the plaintiffs lacked standing and that the action did not qualify as a class action.

Affirmed.

GODFREY P. SCHMIDT, New York, N. Y., *for plaintiffs-appellants.*

EMANUEL DANNETT, New York, N. Y. (McGoldrick, Dannett, Horowitz & Golub, Herbert D. Schwartzman, Eugene Mittleman, and Jerome H. Adler, New York, N. Y., Henry Kaiser and George Kaufman, Washington, D. C., on the brief) *for defendants-appellees American Federation of Musicians of the United States and Canada, Herman D. Kenin, as President of said Federation, Stanley Ballard, as Secretary of said Federation, and George V. Clancy, as Treasurer of said Federation.*

DAVID I. ASHE, Ashe & Rifkin, New York, N. Y., *for defendants-appellees Associated Musicians of Greater New York Local 802, and Al Manuti, as President of Local 802, Max L. Arons, as Secretary of Local 802, and Hi Jaffe, as Treasurer of Local 802.*

Appendix E.

LUMBARD, *Chief Judge*:

Joseph Carroll and Charles Peterson, orchestra leaders, appeal from a judgment of the District Court for the Southern District of New York dismissing their complaints in two actions which sought to enjoin the defendant musicians unions from collecting certain taxes, surcharges and welfare plan payments.[1] The complaints assertedly were class actions. Judge Levet held that no class existed, or if it did, there was insufficient proof either that the members were so numerous that they could not be brought before the court or that the plaintiffs adequately represented any such class. He also held that Carroll and Peterson had no standing to challenge the union exactions because they are no longer members of the union and the exactions are required only of members. We affirm.

The 1½ percent tax and the 10 percent traveling surcharge are described in *Cutler* v. *American Fed. of Musicians,* F. 2d (2 Cir. 1963), decided this day. Welfare plan payments are made to the Local pursuant to its standing resolution which requires the leaders to collect from the purchaser of the performance one dollar per performer for each engagement and remit it to the Local.

After the commencement of this action, Carroll and Peterson were expelled from the union. Since they are not members of the union, they are not required by the union

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[1] We have today held in *Cutler* v. *American Fed. of Musicians,* —— F. 2d —— (2 Cir. 1963) that the demand by the union for taxes and surcharges from orchestra leaders in the single engagement field who never act as sidemen violates §302 of the Labor-Management Relations Act, 29 U. S. C. § 186.

When this appeal was first argued before us on October 3, 1962, it developed that Judge Levet was about to decide the companion case of *Cutler.* The parties then agreed to our suggestion that we await appeal in that case and consider all the cases together. Accordingly, this case was reargued with the appeal in the *Cutler* case on March 19, 1963.

to make any of the payments which they challenge in this action.

We agree with Judge Levet's conclusion that they have no standing to seek injunctive relief against the collection of payments not demanded of them. The reason for their expulsion does not appear in the record. Nowhere is it contended that Carroll and Peterson were expelled for a violation of the union regulations which they were challenging nor do they seek reinstatement. If these two leaders were expelled from the union because they brought this action, or were denied reinstatement on the ground that they contested the exactions, the district court could order their reinstatement, see Labor-Management Reporting and Disclosure Act §§ 101(a)(5), 102, 609, 29 U. S. C. §§ 411(a)(5), 412, 529. If reinstatement were ordered, there would then be the requisite standing for an action such as this. But we agree with Judge Levet that Carroll and Peterson would have the burden of proving their right to reinstatement. Judge Friendly has said in an unreported memorandum of July 17, 1962, denying plaintiffs' motion to continue a preliminary injunction after Judge Levet's judgment in the instant case:

> "When the proof showed that the basis for relief alleged in the complaint, to wit, union membership, had ceased, plaintiffs had the burden of showing other circumstances qualifying them for relief."

Carroll and Peterson contend that they are threatened by the union with reprisals which this court should restrain. We are not convinced, on the basis of the record before us, that the threatened reprisals result from a refusal to pay the exactions. On the contrary, it appears that reprisals, if any, would follow because the plaintiffs are no longer members of the union. This conclusion is supported by the fact that the union does not accept payments from nonmembers, even if they are proffered.

The question of the legality of reprisals for nonmembership is not before us, and we indicate no views regarding such claims. However, we find no proof of actual or potential reprisals because of the nonpayment of the exactions and we therefore conclude that Carroll and Peterson are not entitled to any relief against such asserted reprisals.

Inasmuch as Carroll and Peterson have no standing to seek equitable relief on their own behalf because they are no longer union members, it follows that they cannot adequately represent a purported class of orchestra leaders, all of whom are members of the union. Judge Levet's dismissal of the class action was therefore proper.

The judgment of the district court is affirmed.

FILED
MAR 28 1967
JOHN F. DAVIS, CLERK

No. 1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BEN CUTLER, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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IN THE

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

This case involves only the exercise of the Chancellor's discretion "to do equity in a particular situation" by granting or denying attorneys' fees to the prevailing party, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 167. The District Judge who had tried the suit on which petitioners' claim for attorneys' fees was

based declined, in a considered opinion, to make such an award. In the Court of Appeals the same panel which had decided the underlying case unanimously affirmed this exercise of discretion. A petition for rehearing en banc was unanimously denied, "no active Circuit Judge having requested that a vote be taken on the suggestion that the case be reheard en banc." App. p. 9 *infra*.[1] There is no occasion for further review.

Petitioner Cutler brought this case on his own behalf, and assertedly, on behalf of a class of members of respondent unions limited to those who were also orchestra leaders and employers. The theory of Cutler's complaint was that since he was an employer, § 302 of the Labor Management Relations Act, as amended, 29 U.S.C. § 186, prohibited him from collecting and transmitting to the unions, and the unions from receiving, certain work taxes, as required by the unions' bylaws. The District Court sustained that contention as to Cutler, but in the same opinion ruled that his suit was not a proper class action, 211 F. Supp. 433, 443-446 (S.D.N.Y.), a ruling from which no appeal was ever taken. The Court of Appeals affirmed the holding of illegality, 316 F. 2d 546 (C.A. 2); and this Court subsequently denied *certiorari*, 375 U.S. 941. The other petitioners here were additional plaintiffs in the *Cutler* case, but judgment was ultimately entered against them.

Petitioners' application for counsel fees asserted two theories: (1) that the *Cutler* decision had created

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[1] Despite the requirements of Rule 19 of this Court, Petitioners failed to print the Opinion and Judgment of the Court below. They are reprinted as an appendix to this memorandum, together with the orders denying rehearing.

a fund from which attorneys' fees should be awarded; (2) that the defendants had been benefited by the *Cutler* decision. The District Court carefully considered these contentions and rejected them. The short answer to the fund theory was that the judgment in the *Cutler* case neither created a fund, nor established by *stare decisis* any interest in a fund. (Pet. pp. 22-24). On the basis of the District Judge's examination of each of the asserted claims of benefit, he concluded that "No benefits were conferred upon the defendants sufficient to warrant the exercise of the Chancellor's discretion." The District Judge noted that the plaintiffs did not purport to sue on behalf of the membership as a whole, but on behalf of a small group, asserted to be employers,[2] and that any financial benefit accrued to that group at the expense of the whole membership. Insofar as the asserted benefit was knowledge that a course of conduct constituted a criminal violation, the Court pointed out that it was as much a violation for the plaintiffs as for the defendants and that it was improper to require the defendants to pay attorneys' fees for a mutual benefit. Finally the District Court held that plaintiffs could not claim counsel fees on the theory that the *Cutler* decision had caused the Federation to change its fiscal policy, since plaintiffs themselves had sued to enjoin the bylaw provision which effectuated that change. Pet. pp. 24-26.[3]

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[2] As the Court of Appeals explained in the companion *Carroll* case, that group consisted only of "orchestra leaders in the single engagement field who never act as sidemen", Pet. p. 52, n. 1. It had been stipulated that this group was at most 2 per cent of those members who ever acted as leaders in the single engagement field. This itself, of course, is a fraction of the Federation's membership.

[3] The effort ultimately proved unsuccessful. *Musicians Federation* v. *Wittstein*, 379 U.S. 171.

As the application for counsel fees invoked "individualization in the exercise of a discretionary power", *Sprague* v. *Ticonic National Bank, supra,* at 167, it is not surprising that petitioners were unable to cite any decisions of this Court or of the Courts of Appeals in conflict with the decision below. They nevertheless assert the existence of a "conflict with the decisions in other circuits", citing only a note in 13 *Stanford Law Review* 146 (Pet. p. 12). While we yield to no one in our respect for scholarship, we do not believe that a conflict between a decision of the Court of Appeals and the views of a *Law Review* commentator, even if it existed,[4] would warrant the granting of *certiorari.* The other reasons stated by petitioners for granting the writ are likewise without merit. They claim alternatively that counsel fees should always be granted in suits by members against unions (Pet. pp. 12-13), or at least in suits by members against these defendant unions (Pet. pp. 13-14).[5] The lower courts were entirely justified, to say the least, in refusing to award

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[4] That Note, entitled, *"Shareholders' Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award"*, criticized *Bosch* v. *Meeker Co-op. Light & Power Ass'n,* 257 Minn. 362, 101 N.W. 2d 423 (1960), which had denied an award of counsel fees. The *Cutler* action was not, of course, a shareholder's suit nor, in any other form, a suit brought to protect the interests of the membership as a whole. Moreover, the District Judge herein assumed that counsel fees could be awarded despite the absence of a monetary benefit (Pet. 24-26).

[5] In support of the latter argument, petitioners allege that defendants had violated the law in thirteen separate ways (Pet. pp. 13-14). Since none of these allegations was the subject of the *Cutler* judgment, they are plainly irrelevant to the claim for counsel fees and thus warrant no response here. Indeed, petitioners' argument reinforces the District Court's finding that they are not seeking to benefit defendant unions, but, rather, are pursuing objectives of their own, hostile to the unions' interests.

counsel fees to petitioners because respondents exercised their statutory and constitutional right to defend the legality of their practices "until the last decision of the highest court" (Pet. p. 14).

CONCLUSION

By reason of the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 27—September Term, 1966.

(Argued September 29, 1966 Decided October 3, 1966.)

Docket No. 29272

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a ALLEN MERRITT) and ANGIE BOND, *et al.*, *Plaintiffs-Appellants*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Defendants-Appellees.*

Before: LUMBARD, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Richard H. Levet, *J.*, denying plaintiffs' application for payment of counsel fees.

Affirmed.

PER CURIAM:

We affirm the order of the District Court for the Southern District of New York, which denied plaintiffs' application for payment of counsel fees of approximately $400,000 by the defendant unions, substantially for the reasons set forth in Judge Levet's opinion, reported at 231 F. Supp. 845.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of October one thousand nine hundred and sixty-six.

Present: HON J. EDWARD LUMBARD, *Chief Judge*, HON. HENRY J. FRIENDLY, HON. IRVING R. KAUFMAN, *Circuit Judges.*

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a ALLEN MERRITT) and ANGIE BOND, *et al., Plaintiffs-Appellants,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk

ORDERS DENYING REHEARING

[Caption Omitted]

Petition for Rehearing

Kalman I. Nulman, New York, N. Y.,
for plaintiffs-appellants.

Petition denied.

J.E.L.
H.J.F.
I.R.K.
U.S.C.JJ.

[Caption Omitted]

Petition for Rehearing in Banc

Kalman I. Nulman, New York, N. Y.,
for plaintiffs-appellants.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. EDWARD LUMBARD
Chief Judge

25 November 1966